

- (1) The findings challenged by claimant in this appeal are ones subject to review in appeals from a preliminary order. K.S.A. 44-534a.
- (2) The Appeals Board finds that claimant was an employee of respondent in May 1994.

Claimant injured his right shoulder when a large drill he was operating struck a nail. He was operating the drill while installing an air vent for a kitchen sink. Claimant testified at the preliminary hearing that he had worked for respondent for approximately nine (9) years. When he started he did painting, carpentry and drywall. He was initially paid by the hour and paid weekly.

At a point in time that neither party can identify precisely, but at least several years before the claimant's accident, respondent changed the method by which he paid claimant. Before the change in method of payment, claimant's duties also changed. He began doing plumbing and heating.

The specifics of the new method of payment are not entirely clear from the record. It is clear, however, that respondent began paying claimant on a per-project basis. It also appears clear from the record that when the respondent did not agree with the amount being charged for the project he could unilaterally reduce the amount he paid the claimant. The record also indicates that respondent changed the method of payment because of financial difficulties he was having at the time. He advised all people who were working at that time that they should thereafter consider themselves to be subcontractors.

(2) In spite of the advice by the respondent, the Appeals Board considers the claimant to have been an employee. At the time of the change in method of payment, claimant's duties did not change. The most important test for determining an employment relationship for purposes of the Workers Compensation Act is the right to control. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976). Other factors, such as provision of tools and supplies, may also be important. McCarty v. Great Bend Board of Education, 195 Kan. 310, 403 P. 2d 956 (1965).

Claimant worked principally for respondent. Claimant did a few minor projects for respondent's children on their rental properties, but claimant otherwise worked full-time on projects for the respondent. Respondent provided the tools, with the exception of some small hand tools. Respondent provided all the materials and supplies for the work. In addition, the respondent actually exercised control over claimant's work. Claimant testified that on occasion respondent gave him direction about how to do a project and when it was not done to respondent's satisfaction, respondent advised him he was fired. Respondent later returned and told claimant to go ahead and complete the project. Respondent also required claimant to obtain liability insurance. When claimant did not make his payment, respondent withheld the premium from what he, the respondent, paid claimant. These factors indicate respondent did have the right to control to an extent indicative of an employment relationship. The Appeals Board, therefore, finds that claimant was an employee in May 1994.

(3) Claimant did make timely written claim. The application for hearing was filed in this case on March 23, 1995. Respondent's insurance carrier acknowledges receipt of written claim on February 15, 1995. Claimant gave notice of the accident, but respondent did not file a report of accident. Accordingly the claimant had one (1) year from the date of accident to make written claim. Claimant did, therefore, make timely written claim.

The Appeals Board notes that this claim involves two alleged accidents. The second was in January 1995. The Administrative Law Judge also denied benefits for the January 1995 accident. Claimant has not appealed from the rulings relating to the 1995 accident.

Because the Administrative Law Judge found claimant was not an employee and did not file a timely written claim for the May 1994 accident, no ruling was made regarding

the need for temporary total disability or medical benefits for the 1995 accident and injury. It is necessary, therefore, to remand the claim for a decision regarding whether claimant is temporarily totally disabled and in need of medical treatment for the 1994 accident.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the findings by the Administrative Law Judge relating to the 1994 accident should be, and the same are hereby reversed. The action is remanded to the Administrative Law Judge for decision regarding whether claimant is temporarily totally disabled and in need of medical treatment for his May 1994 accident which arose out of and in the course of his employment for respondent, Wamego Lumber Company, Inc.

IT IS SO ORDERED.

Dated this ____ day of October, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John M. Ostrowski, Topeka, Kansas
Mark Buck, Topeka, Kansas
James R. Ward, Administrative Law Judge
Philip S. Harness, Director